Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JOSEPH and ALICE MORRISON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err by failing to assess whether jurisdiction under the Clean Water Act extends to Petitioners' property in light of this Court's decision in *Rapanos v. United States*?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Joseph and Alice Morrison (Morrisons), respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unofficially published at 178 Fed. Appx. 481 (6th Cir. 2006), and is included in Appendix (App.) A. The panel opinion of the Court of Appeals denying the petition for rehearing and rehearing en banc is not published but is included in App. G. The opinion of the district court adopting the magistrate judge's report and recommendation is not published but is included in App. B, along with the report and recommendation.

JURISDICTION

On March 29, 2005, the district court adopted the magistrate judge's report and recommendation finding jurisdiction under the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act" or "CWA"). App. B. The judgment of the Court of Appeals for the Sixth Circuit affirming the district court was entered on April 26, 2006. App. A. That court's denial of the Petition for Rehearing and Rehearing En Banc was entered on August 25, 2006, App. G. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> (6) The territorial seas;

> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a).

Federal regulations define "adjacency" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

This case concerns the statutory scope of the CWA and, specifically, whether a court of appeals may ignore the binding precedent of this Court when determining the extent of federal jurisdiction under the CWA. On June 19, 2006, this Court decided *Rapanos v. United States*, 126 S. Ct. 2208 (2006), reversing the Sixth Circuit's determination that CWA jurisdiction extends to any wetland that bears a mere hydrological connection to a traditional navigable waterway.

The Morrisons have been found liable for a civil penalty of $25,000 for discharging a pollutant into "navigable waters" without a Corps permit. In *Rapanos*, this Court rejected the Corps's basis for jurisdiction over the Morrisons' property. Hence, the Sixth Circuit's failure to cite, let alone discuss, *Rapanos* in denying the Morrisons' petition for rehearing and rehearing en banc constitutes such a "depart[ure] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

Further, the Morrisons respectfully suggest that certiorari is appropriate here given that their case is essentially indistinguishable from *Gerke Excavating, Inc. v. United States*, 126 S. Ct. 2964 (2006) (mem. opinion), in which the Seventh Circuit had affirmed CWA jurisdiction over Gerke's property under pre-*Rapanos* standards. After *Rapanos* was issued, the

Court granted Gerke's petition for certiorari, vacated the Seventh Circuit's judgment, and remanded the case for further proceedings consistent with *Rapanos*. Because the Sixth Circuit decided against the Morrisons prior to *Rapanos* and failed to cite *Rapanos* in its denial of the Morrisons' petition for rehearing and rehearing en banc, this Court should grant the Morrisons' petition for certiorari to vacate the judgment of the Sixth Circuit and remand the case for further proceedings in light of *Rapanos*.

STATEMENT OF THE CASE

The Morrisons own and live on property on Harsens Island, Michigan, near the mouth of the St. Clair River, a navigable waterway. Some twelve years ago, the Morrisons attempted to repair a malfunctioning water supply line on their property, in the vicinity of which runs a canal that empties into the St. Clair, approximately one quarter mile away. The United States sued the Morrisons in a civil enforcement action for violating Section 404 of the Clean Water Act, alleging that their water line repair entailed the unpermitted discharge of dredge and fill material into jurisdictional wetlands.

The CWA prohibits discharges of "fill" material into "navigable waters" unless permitted by the federal government. *See* 33 U.S.C. §§ 1311(a) and 1344(a) (CWA § 301(a) and 404(a)). The Act defines "navigable waters" only as "waters of the United States." 33 U.S.C. § 1362(5)-(7). Although the CWA does not mention "wetlands" in any relevant provision, federal agencies have defined "waters of the United States" to include wetlands the "use, degradation or destruction of which could affect interstate or foreign commerce" or any wetland "adjacent" to a tributary of a "navigable water." 33 C.F.R. § 328.3(a). In this case, the government and the courts have determined that these regulations authorize federal regulation over any "adjacent" wetland, regardless of whether the wetland

is distinguishable from the navigable water or whether the wetland significantly affects the chemical, physical, or biological integrity of the navigable water. *See* Apps. A and B.

The District Court Decision

The United States brought this action for injunctive and monetary relief in the United States District Court for the Eastern District of Michigan. The government contended before the district court that the Morrisons had violated the CWA by depositing "fill" material into jurisdictional wetlands. The fill was placed there in the process of replacing a buried water line. These actions, the government argued, amounted to the discharge of a pollutant into a "navigable water" of the United States. On the government's renewed motion for summary judgment, App. J, the district court found for the United States and assessed a civil penalty of $25,000 against the Morrisons, App. I. The district court subsequently vacated *sua sponte* the civil penalty, App. I, but the Sixth Circuit on appeal reversed the district court and directed it to reimpose the civil penalty, Apps. D and E, which the district court did, App. C. The Morrisons later moved to dismiss the entire action and for relief from judgment. The magistrate judge recommended that the motions be denied. App. B-3. The district court affirmed the magistrate's report. App. B-1.

The Sixth Circuit's Decision

The Morrisons appealed the district court's adoption of the report and recommendation to the Sixth Circuit. The government, in response to the Morrisons' appeal, did not address the appeal's merits but rather limited the answering brief to the position that the Morrisons' notice of appeal was untimely. Specifically, the government argued that the Morrisons had no procedural right to contest, within the context of a garnishment proceeding to collect the $25,000 fine, the merits of the action several years after summary judgment had been entered against them.

The Sixth Circuit affirmed the district court without addressing the government's timeliness argument. The Circuit determined that because the St. Clair is navigable-in-fact and the Morrisons' property is "adjacent" thereto, CWA jurisdiction is present. The Morrisons moved for rehearing and rehearing en banc on the grounds, inter alia, that their property lacked the requisite "significant nexus" to the St. Clair. This Court decided *Rapanos* a few weeks after the rehearing petition had been filed. Thereafter the Morrisons submitted a notice of supplemental authority to the Sixth Circuit, alerting it of this Court's decision. *See* App. H. Approximately two months later, the Circuit denied the Morrisons' rehearing petition because "the issues raised in the petition were fully considered upon the original submission and decision of the case." App. G. The petition denial contains no mention of this Court's decision in *Rapanos* and no legal analysis as to why pre-*Rapanos* adjacency jurisdiction is equivalent to post-*Rapanos* adjacency jurisdiction.

In *Rapanos*, both the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy rejected the hydrological connection test for establishing jurisdiction (and adjacency). *See Rapanos*, 126 S. Ct. at 2227 (plurality opinion); *id.* at 2248 (Kennedy, J., concurring in the judgment). Below, the government did not contend that the Morrisons' property qualifies as "adjacent" wetlands under the plurality's or Justice Kennedy's test; and neither the district court nor the Sixth Circuit made that finding.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE PETITION TO REQUIRE THE COURT OF APPEALS TO APPLY CURRENT AND BINDING PRECEDENT TO DETERMINE WHETHER PETITIONERS' PROPERTY FALLS WITHIN CLEAN WATER ACT JURISDICTION

The court of appeals determined that the Morrisons' property is covered under the CWA because it is "adjacent" to the navigable-in-fact St. Clair. The Sixth Circuit cited to *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), for the proposition that jurisdiction obtains where there is a significant nexus between the wetlands and the jurisdictionally sufficient waterbody; and that a significant nexus is present where wetlands are "adjacent" to the jurisdictional waterbody. 178 Fed. Appx. at 483, App. at A-4. The court of appeals accepted as undisputed that the Morrisons' wetlands are adjacent to the St. Clair. *Id.* at 482, App. at A-2. Because the court of appeals's opinion contains no substantive discussion of the nature of the connection between the Morrisons' property and the St. Clair, it is appropriate to conclude that the Sixth Circuit approved *sub silentio* the reasoning of the district court (subsequently reaffirmed by the magistrate judge and district court) in determining that the Morrisons' property is adjacent to the St. Clair.

The district court relied upon *Riverside Bayview* for the rule that wetlands "adjacent" to waters covered under the CWA are themselves subject to CWA jurisdiction. App. at F-5 to F-6. The district court also concluded that the government had carried its burden for summary judgment on this issue through

the declarations of Jean Battle, a Corps biologist, and Dr. Donald Tilton, a botanist and wetlands scientist. App. at F-6.

The Tilton Declaration is wholly concerned with establishing that the Morrisons' property qualifies as wetlands. *See* Tilton Decl. ¶¶ 11-12 (App. at K-4). The declaration is silent as to the type or quality of connection between the Morrisons' property and the St. Clair. The Battle Declaration is similarly unilluminating. Although it discusses how the Morrisons' property qualifies as wetlands, it simply declares without explanation that the property comprises jurisdictional wetlands. *See* Battle Decl. ¶ 8 (App. at L-3). The declaration contains no discussion of the quantity or quality of connection between the Morrisons' property and the St. Clair.

Thus, the declarations upon which the district court relied, and upon which the court of appeals affirmed, are insufficient in themselves to support CWA jurisdiction after *Rapanos*. Under the *Rapanos* plurality test, a wetland can be adjacent to a jurisdictional body of water, and thus itself subject to jurisdiction, if and only if the wetland has a continuous surface water connection with the jurisdictional body of water such that one cannot tell where the water ends and the wetland begins. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion). In contrast, under the test announced in Justice Kennedy's concurring opinion, a wetland is adjacent and jurisdictional "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " *Id.* at 2248 (Kennedy, J., concurring in the judgment).

Although the *Rapanos* majority did not agree upon a single legal standard for determining CWA jurisdiction, the rule announced by the Court in *Marks v. United States*, 430 U.S. 188 (1977), for determining the holding of the Court when no opinion garners a majority of justices' votes suggests that the

Rapanos plurality opinion authored by Justice Scalia is controlling. Under the *Marks* rule,

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .

Id. at 193 (quotations marks omitted).

Among the *Rapanos* majority opinions, the plurality opinion constitutes the "narrowest grounds" because its rationale is a logical subset of Justice Kennedy's concurrence. *See United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006). The *Marks* rule is founded upon the principle that

> [t]he Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992) (footnote omitted). According to this understanding, in *Rapanos* the plurality opinion functions as a strict scrutiny standard of review and Justice Kennedy's concurrence as a rational basis standard of review. That is so because a wetland passing the plurality's jurisdictional test—*i.e.*, a wetland that is "indistinguishable" from a traditional river, lake, or stream that is connected to a navigable-in-fact waterway—will almost certainly be found to have a "significant nexus" with a

traditional navigable water, especially given that Justice Kennedy's concurrence does not require a hydrological connection to establish jurisdiction. *See* 126 S. Ct. at 2251 (Kennedy, J., concurring in the judgment).

Although Justice Kennedy's test would find jurisdiction in all cases where the plurality opinion would, the converse is not true. That is to say, the scope of jurisdiction under the plurality test is not coextensive with the scope of jurisdiction under Justice Kennedy's test, but rather is narrower than Justice Kennedy's test. The plurality opinion made clear that it would not find jurisdiction in the typical application of Justice Kennedy's test:

> Wetlands are "waters of the United States" if they [are] . . . as a practical matter *indistinguishable* from waters of the United States. . . . [Whereas, under] Justice Kennedy's test[, jurisdictional wetlands are those that,] "either alone or in combination with similarly situated lands in the region, significantly *affect* . . . other covered waters more readily understood as 'navigable.' But what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?

Id. at 2234 (plurality opinion). Given that the aquatic flow between a wetland and jurisdictional waterbody must be so great as to render the two indistinguishable to support jurisdiction under the plurality test, whereas there need not even be a hydrologic connection between wetland and waterbody to justify jurisdiction under Justice Kennedy's test, it is evident that the plurality opinion is the logical subset and thus the controlling opinion under *Marks*.[1]

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[1] Additional, practical reasons as to why the plurality opinion ought to be controlling include that the plurality test has the virtue of ease of

(continued...)

Under the plurality test, the declarations of Ms. Battle and Dr. Tilton do not support a finding of jurisdiction. Given that the Morrisons' property is located on the landward edge of a residential subdivision, *see* Battle Decl. Exhs. C and D (App. at L-8 to L-9), their wetlands are easily distinguishable from the river itself and thus do not meet the plurality test.

Even if jurisdiction may be proved under Justice Kennedy's test, the evidence offered by the government in this case is still insufficient. Neither the Battle nor Tilton Declaration contains any mention of the quantity or quality of the chemical, physical, or biological connection between the Morrisons' wetlands (or all similarly situated wetlands on Harsens Island) and the St. Clair.[2] That finding is required for jurisdiction under Justice Kennedy's test.

The Sixth Circuit denied the petition for rehearing and rehearing en banc even though, during the pendency of the petition, the relevant rule for ascertaining jurisdiction had changed. Assuming *arguendo* that the "significant nexus" test intimated by *Riverside Bayview* and suggested by *SWANCC* remains the standard today, the contents of that standard after *Rapanos* have changed considerably. The government measured "significant nexus" in *Rapanos* by the hydrological

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[1] (...continued)
application for landowners and regulators alike, while also hewing more closely to the government's original interpretation of "waters of the United States" as navigable-in-fact waters. *See SWANCC*, 531 U.S. at 168. One district court has already adopted the plurality opinion as containing the controlling jurisdictional test. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

[2] In fact, the Corps stated in its environmental assessment reviewing the Morrisons' after-the-fact CWA permit application that the Morrisons' fill activity would have only "a minor, long term, negative impact on water quality." App. at M.

connection rule; presumably the government intended to use the same rule to establish jurisdiction over the Morrisons' property. Yet in *Rapanos* a majority of this Court found the hydrological connection rule to be legally insufficient for ascertaining CWA jurisdiction. Thus, the government has not established CWA jurisdiction; and the Sixth Circuit's failure to apply the correct jurisdictional rule constitutes such a gross abdication of an appellate court's duty as to merit the invocation of this Court's supervisory power. *Cf. Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.").

CONCLUSION

This Court should grant the Petition for Certiorari to ensure that its decision in *Rapanos* is applied to all pending and future cases concerning the extent of federal jurisdiction under the Clean Water Act. In this case, the Sixth Circuit failed to provide any analysis regarding the effect of *Rapanos* on the jurisdictional question presented. *Rapanos* was decided just two weeks after the Morrisons filed their petition for rehearing and rehearing en banc. The Sixth Circuit denied the Morrisons' petition over two months after *Rapanos* was decided, notwithstanding the Morrisons' submission of a notice of supplemental authority alerting the Circuit to this Court's decision. The Sixth Circuit's failure even to acknowledge the precedent—let alone its failure to explain the precedent's application—constitutes a gross dereliction and abdication of the duty of a court of appeals faithfully to apply the binding precedent of this Court. *Cf. Jaffree v. Bd. of Sch. Comm'rs of Mobile County*, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983) (district court as well as Supreme Court Justice sitting as Circuit Justice bound to apply decisions of Supreme Court);

Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (lower courts bound to apply even summary decisions of Supreme Court).

For these reasons, this Court should grant the Morrisons' Petition for Writ of Certiorari.

DATED: November, 2006.

Respectfully submitted,

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Appendix A–1

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* JOSEPH and ALICE PAULEY; MORRISON, *Defendants-Appellants.*	No. 05-1552

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit

Filed: April 26, 2006

Before: DAUGHTREY and GILMAN, Circuit Judges;
RUSSELL, District Judge.*

Jennifer J. Peregord, U.S. Attorney's Office, Detroit, MI, for Plaintiff-Appellee.

Keay Fallowfield, Keay Fallowfield Assoc., Croswell, MI, for Defendants-Appellants.

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* Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

RUSSELL, District Judge.

Defendants-Appellants Joseph and Alice Pauley Morrison ("Morrisons") appeal the decision of the Eastern District of Michigan in upholding the recommendation by the Magistrate Judge that the Plaintiff-Appellee United States of America ("Government") had territorial jurisdiction over the Morrisons' property located on Harsens Island, Michigan.

BACKGROUND

In its complaint, the Government asserts that in June of 1994, the Morrisons either "performed or caused to be performed" actions within U.S. waters by either "trenching, grading or filling wetlands" on their property located at 3010 Green Drive, Harsens Island, Michigan. Specifically, the Government alleges that the Morrisons conducted an illegal fill in the wetlands by depositing and grading fill material into that area, and by digging, repairing and then reburying a broken water line located in that area. The United States Army Corps of Engineers determined that the land in question qualified as a "wetland" as defined by the Clean Water Act.

The wetlands in question are adjacent to the St. Clair River. The Morrisons do not dispute that fact in this appeal. In its complaint, the Government also claims that the wetlands are considered part of the United States for purposes of 33 U.S.C. § 1344 of the Clean Water Act. The Morrisons dispute that fact in this appeal, claiming the land does not fall under U.S. jurisdiction for purposes of the Clean Water Act.

The land in question involves territory that was disputed in the past between the United States and British Canada. In 1828, following an agreement on a border between the United States and British Canada, the American Land Board recognized the claim of Jacob Harsens ("Harsens") to the upper part of the island ("surveyed land"), providing him with patents that he accepted at that time. In 1837, Michigan became a state

of the union. Thirteen years later in 1850, the U.S. Congress passed the Swamp Land Act, which granted certain states title to all swamp lands within their borders; Michigan was one of the states included by Congress in that Act. In 1910, the Supreme Court of Michigan determined that the "unsurveyed land," or lower part of Harsens Island, belonged to the State of Michigan as set forth by the Swamp Land Act.

STANDARD OF REVIEW

The Court reviews the district court's grant of summary judgment *de novo*, using the same standards applicable to the district court. *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). Summary judgment is proper if the evidence submitted shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This Court must view the entire record in the light most favorable to the non-moving party. *Smith v. Chrysler Corp.*, 155 F.3d 799, 804 (6th Cir. 1998). On appeal, the Court will not generally consider new arguments that were not presented to the district court unless such failure to consider the issue will result in a miscarriage of justice. *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993).

ANALYSIS

In 1828, when Harsens received his patents from the federal government for the land, the federal government held title to the surveyed wetlands. The fact that the patents provided to Harsens came from the United States demonstrates that the United States had made its claim to the island. Today, all of the island is part of the territorial jurisdiction of the United States as it has been a part of the State of Michigan since 1837, when Michigan joined the union. As such, the United States has territorial jurisdiction under the Clean Water Act over the

surveyed lands because these wetlands belong to the United States.

The title for the unsurveyed wetlands belongs to the State of Michigan. The State of Michigan is a part of the territorial jurisdiction of the United States for purposes of the Clean Water Act. Consequently, title to the unsurveyed wetlands in question belongs to the State of Michigan, and Michigan falls within the territorial jurisdiction of the United States for purposes of enforcing the Clean Water Act.

The United States Supreme Court has held that there must be a "significant nexus" between a wetland and navigable waters in order for the Clean Water Act to apply. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 & 173, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*"). The Court in *SWANCC* stated that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *SWANCC* at 167, 121 S.Ct. 675; *quoting United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) ("*Riverside*"). The Court held that there must be a "significant nexus" between the wetlands and navigable waters in order for the United States to have jurisdiction over the wetlands in question. *SWANCC* at 167, 121 S.Ct. 675. A significant nexus between a wetland and a body of water occurs when a wetland is adjacent to a navigable body of water. *Id.*; *Riverside* at 133-135, 106 S.Ct. 455. The Clean Water Act, under 33 U.S.C. § 1362(7) & (8) defines "navigable waters" as "the waters of the United States." In *Riverside*, the United States Supreme Court specifically mentioned wetlands that are adjacent to a river as falling within the coverage of the Clean Water Act. *Id.* at 134, 106 S.Ct. 455.

In the instant matter, regardless of whether or not the property of the Morrisons is a part of the unsurveyed or

surveyed wetlands, both wetlands are adjacent to the St. Clair River. Under the definition of a navigable body of water as defined by the Clean Water Act and noted by the Supreme Court in *Riverside*, the St. Clair River is a navigable body of water within the United States. Accordingly, a significant nexus exists between the wetlands and the St. Clair River. Therefore, the United States has territorial jurisdiction over the Morrisons' property for purposes of enforcing the Clean Water Act.

CONCLUSION

The District Court did not err when it adopted the report and recommendation of the Magistrate Judge in determining the matter of territorial jurisdiction. Therefore, we AFFIRM the order of the District Court adopting the report and recommendation of the Magistrate Judge, and hold that the Government has territorial jurisdiction over the Morrisons' property.

Appendix B–1

FILED MAR. 29, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 99-71069

HONORABLE DENISE PAGE HOOD

vs.

ALICE MORRISON, and JOSEPH MORRISON,

Defendants.
_____/

ORDER ACCEPTING REPORT AND RECOMMENDATION

This matter is before the Court on Magistrate Judge Steven D. Pepe's Report and Recommendation dated November 3, 2004. An objection has been filed to the Report and Recommendation.

This Court has had an opportunity to review the Report and Recommendation and finds that the Magistrate Judge reached the correct conclusion for the proper reasons. The Court agrees with the Magistrate Judge that Defendants [*sic*] motion under Rule 12(b)(6) is without merit. The Court further

agrees with the Magistrate Judge that there were sufficient facts to establish a violation of the Clean Water Act and that the United States and this Court unquestionably have jurisdiction over Harsens Island and all matters related to it stemming from this case.

The Court agrees with the Magistrate Judge that final judgment was entered almost four years ago and it was found then, as it is found now, that there were sufficient facts to establish a violation of the Clean Water Act. The Court also agrees that Defendants have specified no reason, nor have they stated an "extraordinary ground", for relief from judgment under Fed.R.Civ.P. 60(b)(6). Defendants claim that a mistake has been made regarding the Court's jurisdiction of Harsens Island. The Court agrees with the Magistrate Judge that Defendants' claim of mistake is unfounded.

Accordingly,

IT IS ORDERED that Magistrate Judge Steven D. Pepe's Report and Recommendation Denying Defendants' Motion to Dismiss dated November 3, 2004 is ACCEPTED and ADOPTED as this Court's finding of fact and conclusions of law.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (Docket No. 167, filed July 14, 2004) is DENIED.

/s/ Denise Page Hood

DATED: MAR 28 2005

DENISE PAGE HOOD
United States District Judge

Appendix B–3

FILED NOV. 3, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALICE MORRISON, and JOSEPH MORRISON, Husband and Wife,

Defendants.
_____/

Case No. 99-71069

Honorable Denise Page Hood
Honorable Steven D. Pepe

Report and Recommendation Denying Defendants' Motion to Dismiss (#167)

I. Background

On March 5, 1999, the United States filed a complaint against Alice Pauley and her father, Samuel Pauley, who together owned certain real property on Harsens Island, Michigan; Joseph Morrison, who claimed to have an ownership interest in the property; and John Horvath, a construction contractor. The complaint alleged that the defendants violated

the Clean Water Act[1], which requires permits for the discharge of dredged or fill material, by trenching, grading, and filling wetlands on the Pauleys' property without a permit. The complaint sought a civil fine and an injunction requiring the defendants to restore the property to its natural condition.

On October 31, 2000, summary judgment was awarded to the United States. The court found that the defendants had "discharged a pollutant, from a source point, into navigable waters of the United States, without a permit" within the meaning of the Clean Water Act. On March 30, 2001, a civil penalty of $25,000 was entered against Joseph Morrison and Alice Pauley pursuant to 33 U.S.C. § 1319(d). This penalty was vacated *sua sponte* on June 7, 2001. The U.S. appealed and on February 26, 2003, a slip opinion from the U.S. Court of Appeals was issued reversing and remanding the case for reimposition of the fine. On March 17, 2003, the $25,000 fine was reinstated. On October 22, 2003, the U.S. Supreme Court denied a writ of certiorari. On April 22, 2004, the undersigned denied Defendants' motion to stay execution of garnishment and Defendants' motion for a hearing regarding the attempted garnishment and claim for exemptions. On September 16, 2004, Defendants filed the current motion to dismiss, which was referred to the undersigned pursuant to 28 U.S.C. 636(b)(1)(A) and (B). For the following reasons, Defendants' motion should be DENIED.

II. Standard of Review

1. *Dismissal pursuant to Fed. R. Civ. P. 12(b)(6)*

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL

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[1] Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1977).

PRACTICE AND PROCEDURE § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, *pro se* complaints are to be construed liberally, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). It is also well established, however, that conclusory, unsupported allegations of constitutional deprivation do not state a claim.

2. *Relief from final judgment*

Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresenta-tion, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The "catch-all" category of "any other reason justifying relief" is reserved for extraordinary circumstances.[2]

III. *Analysis*

Defendant motion under Rule 12(b)(6) is without merit. Defendants maintain, once again, that there are no facts which would show a violation of the Clean Water Act and there are no facts to show that this Court has jurisdiction over Harsens Island. Both of these issues have been addressed extensively in previous orders. Final judgment was entered almost four years ago and it was found then, as it is found now, that there were sufficient facts to establish a violation of the Clean Water Act. Additionally, the issue of jurisdiction has been addressed in a order by the undersigned of April 22, 2004; the United States and this Court unquestionably have jurisdiction over Harsens Island and all matters related to it stemming from this case.

Defendants have specified no reason, nor have they stated an "extraordinary ground", for relief from judgment under F.R.Civ.P. 60(b)(6). Defendants claim that a mistake has been made regarding the Court's jurisdiction of Harsens Island. As stated above, this issue has been rejected by all of the courts that have been involved in this case. Defendants claim of mistake is unfounded.

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[2] *See, e.g., Pierce v United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985), *cert. denied*, (the court should allow relief under Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the other five subsections of the rule); *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 311 (3d Cir. 1999) (available only in extraordinary circumstances, and commenting that intervening developments in the law will, by themselves, rarely constitute basis for relief under Rule 60(b)(6); *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998), *cert. denied*, (used "sparingly" as equitable remedy to prevent manifest injustice).

IV. *Recommendation*

For the reasons stated above, it is recommended that Defendants' motion be DENIED.

Any objections to this Report and Recommendation must be filed within ten (10) days of its service. 28 U.S.C. § 636(b)(1); E.D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ivey v. Wilson*, 832 F.2d 950, 957-58 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

SO ORDERED.

Dated: November 3, 2004
Ann Arbor, Michigan

s/Steven D. Pepe
United States Magistrate Judge

Appendix C–1

FILED MAR. 17, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case Number: 99-CV-71069-DT

HON. GEORGE E. WOODS

v.

SAMUEL PAULEY, ALICE PAULEY, JOSEPH MORRISON, and JOHN HORVATH, jointly and severally,

Defendants.
_____/

ORDER REINSTATING $25,000 FINE

On February 24, 2003, the United States Court of Appeals for the Sixth Circuit held that this Court lacked the power to vacate, sua sponte, a $25,000 fine imposed against Defendants Alice Pauley and Joseph Morrison. The appellate court remanded the matter for reimposition of the fine.

IT IS HEREBY ORDERED that the March 30, 2001, civil penalty entered against Defendant Alice Pauley Morrison and

Joseph Morrison, jointly and severally, in the amount of $25,000 shall be, and hereby is, **REINSTATED.**

IT IS FURTHER ORDERED that Alice Pauley Morrison and Joseph Morrison shall pay the penalty by a check made payable to the United States of America, in care of Geneva Halliday, Assistant United States Attorney, U.S. Attorney's Office, 211 W. Fort Street, Suite 2001, Detroit Michigan, 48226. Plaintiff shall be entitled to interest as provided by law.

IT IS SO ORDERED.

/s/ George E. Woods
GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

Dated: March 17, 2003
Detroit, Michigan

Copies mailed this date to:

James K. O'Brien, Esq.
Geneva S. Halliday, Esq.
Alice Pauley Morrison and Joseph Morrison
United States Marshal Service

Appendix D–1

FILED FEB. 24, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-2107

UNITED STATES OF AMERICA,
Plaintiff - Appellant,

v.

SAMUEL PAULEY; JOHN HORVATH,
Defendants,
ALICE PAULEY; JOSEPH MORRISON,
Defendants-Appellees.

Before: GUY and MOORE, Circuit Judges; BECKWITH, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the cause is REMANDED for reimposition of the $25,000 fine.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Appendix E–1

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* *v.* SAMUEL PAULEY; JOHN HORVATH, *Defendants,* ALICE PAULEY; JOSEPH MORRISON, *Defendants-Appellees.*	No. 01-2107

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 99-71069—George E. Woods, District Judge

Submitted: January 28, 2003

Decided and Filed: February 24, 2003

Before: GUY and MOORE, Circuit Judges; BECKWITH, District Judge.*

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* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

ON BRIEF: Jennifer J. Peregord, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellant. Alice Pauley, Joseph Morrison, Harsens Island, Michigan, pro se.

OPINION

KAREN NELSON MOORE, Circuit Judge. The United States, which had been granted summary judgment on its Clean Water Act action against defendants Alice Pauley and Joseph Morrison, appeals from the district court's *sua sponte* order that vacated the $25,000 fine that the district court had previously imposed. Because the district court lacked the power to grant such relief *sua sponte*, we **REVERSE** the district court.

I. BACKGROUND

On March 5, 1999, the United States filed a complaint against Alice Pauley and her father, Samuel Pauley, who together owned certain real property on Harsens Island, Michigan; Joseph Morrison, who claimed to have an ownership interest in the property; and John Horvath, a construction contractor. The complaint alleged that the defendants violated the Clean Water Act by trenching, grading, and filling wetlands on the Pauleys' property without a permit. The complaint sought a civil fine and an injunction requiring the defendants to restore the property to its natural condition.

On October 31, 2000, U.S. District Judge Cleland awarded summary judgment to the United States. The court found that the defendants had "discharged a pollutant, from a source point, into navigable waters of the United States, without a permit,"

Joint Appendix ("J.A.") at 29, within the meaning of the Clean Water Act. Accordingly, the court scheduled a penalty hearing on February 8, 2001, to determine the scope of any relief. At the hearing, the government presented a consent decree between the United States and defendant Samuel Pauley. Samuel Pauley, who had quit-claimed his interest in the property to Alice Pauley and Joseph Morrison on January 26, 2001, shortly before the scheduled penalty hearing, agreed to hire a contractor to restore the property. According to the consent decree, Samuel Pauley would hire a contractor to remove all fill material from the wetland by May 15, 2001. The consent decree was contingent on either Samuel Pauley receiving permission from the new owners, Alice Pauley and her husband, Joseph Morrison, to enter the property and complete the restoration or on a court order requiring the new owners to permit him the necessary access. On February 8, 2001, the court ordered Alice Pauley to "allow access to the property by the Contractor and Corps of Engineers to complete the restoration as set forth in the Consent Decree." J.A. at 81.

Before considering a civil penalty, the court adjourned the penalty hearing for six weeks so that Alice Pauley and Joseph Morrison could retain counsel. When the hearing resumed, and the defendants informed the court that they would proceed pro se, Judge Cleland imposed a $25,000 fine against Alice Pauley and Joseph Morrison for their Clean Water Act violations. The fine was imposed pursuant to 33 U.S.C. § 1319(d), which authorizes civil penalties up to $25,000 per day of violation and requires the court to consider the seriousness of the violation, any history of violations, good-faith efforts to comply with requirements, the impact of the fine on the offender, and any other factors that "justice may require." 33 U.S.C. § 1319(d). Granting the United States's request to impose the maximum fine allowed for one day of violation, Judge Cleland noted that the land had been in violation for approximately six years. Although the scope of the violation was not huge, Judge

Cleland said, as it affected only a small piece of land, Alice Pauley's and Joseph Morrison's history of refusing to comply with the law warranted the fine. Judge Cleland said that they had failed to keep their promises that they would remedy the violation, and he cited the "strong indications that the defendants were, essentially, stringing the Corps along, and trying to see if . . . the Corps would simply give up after a period of time," J.A. at 245. The court also considered Alice Pauley's and Joseph Morrison's economic situations and the costs to the government of their intransigence before imposing the $25,000 fine.

Despite the injunction, Alice Pauley refused Samuel Pauley, the contractor, and the Army Corps of Engineers access to the property to comply with the terms of the settlement. According to the United States, Alice Pauley sent the government a letter in late February stating that "we have decided that we will NOT allow ANY . . . ONE on our property," and that "we do not plan on being bullied into anything especially by the Court or the Plaintiff(s)." J.A. at 83-84. On May 9, 2001, the government received a letter from Samuel Pauley's attorney, who stated that on at least five separate occasions, Alice Pauley had told Samuel Pauley that she would not allow him or his contractor access to the property. That day, the United States filed an emergency motion to enforce the consent decree. Judge Cleland disqualified himself, and the case was reassigned to U.S. District Judge Woods.

At the hearing on the United States's emergency motion, Judge Woods appears to have succeeded in convincing Alice Pauley to comply with the court's order. However, Judge Woods also vacated *sua sponte* the $25,000 fine that Judge Cleland had levied against Alice Pauley and Joseph Morrison. Judge Woods announced early in the hearing, "The Court expects the imposition of fines will not motivate Alice Pauley[] to comply. I told you I'm not impressed with fines. I'm not

interested in fines being imposed." J.A. at 263. Then, after recounting the case's history, Judge Woods invited Alice Pauley to the lectern and announced, "Tell you what I'm going to do right now. I'm setting aside [the] $25,000 fine. I don't think it serves any purpose at all and I do not feel that it is a sword hanging over your head at all." J.A. at 273. In denying the United States's motion to reconsider, Judge Woods said, "I've set aside the $25,000 fine which may have had something to do with getting this baby settled. So be it. It's set aside." J.A. at 288. Judge Woods entered an order vacating the civil penalty.

The United States timely appealed from the order vacating the civil penalty, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. ANALYSIS

As Judge Cleland's comments in imposing the $25,000 fine indicate, Alice Pauley and Joseph Morrison have a history of obstructing the Corps's efforts to enforce the Clean Water Act and to remedy the violations on Alice Pauley's property. Accordingly, when the case came before Judge Woods on the United States's emergency motion to compel compliance, Judge Woods was understandably prepared to use whatever tools he had available to accomplish compliance with the court's earlier injunction. However, vacating *sua sponte* one order in an effort to encourage a party to comply with another order was not, under our precedent, an available tool.

Judge Woods did not explicitly indicate the basis on which he vacated the $25,000 civil penalty, but we interpret the district court as having relieved the defendants from a final judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), as this rule most nearly describes the district court's action. Rule 60(b)(6) provides that, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment" for "any . . . reason

justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The civil fine from which the district court granted relief constituted a final judgment, as it had been imposed in connection with a judgment granting summary judgment with respect to all of the plaintiff's claims against all remaining defendants. That the district court had maintained jurisdiction to ensure that the injunctive relief was properly accomplished is irrelevant for purposes of determining whether the grant of summary judgment and imposition of a civil penalty constituted final judgment, as "the court may enter a final and appealable judgment and still retain jurisdiction over the action so as to make sure that its order is applied correctly." 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2651 at 14 (3d ed. 1998) (interpreting Fed. R. Civ. P. 54(a), which defines "judgment" as used in Federal Rules of Civil Procedure). Accordingly, the question is whether the Rule 60(b) relief was properly granted. We review orders granting relief from a prior order under Rule 60(b) for abuse of discretion, but we review questions of law de novo. *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 572 (6th Cir. 2001), *cert. denied*, -- U.S. --, 122 S. Ct. 1908 (May 13, 2002).

We have held that a district court may not *sua sponte* grant relief pursuant to Rule 60(b).[1] In *Eaton v. Jamrog*, 984 F.2d

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[1] Circuits are split on the question whether a district court may grant Rule 60(b) relief *sua sponte*. The Tenth Circuit agrees with our view that such relief is impermissible. *See Dow v. Baird*, 389 F.2d 882, 884-85 (10th Cir. 1968) (noting that whereas Rule 60(a) permits the district court to correct clerical errors "of its own initiative," Rule 60(b) permits corrections only upon motion). The Second, Fourth, Fifth, and Ninth Circuits have held that such *sua sponte* relief is permissible. *See Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir. 2001) ("While normally such relief is sought by motion of a party, *see* Fed.R.Civ.P. 60(b), nothing forbids the court to grant

(continued...)

760 (6th Cir. 1993), we reasoned that because Rule 60(b) explicitly requires relief under the rule to occur "on motion," courts may not grant such relief except upon "a motion from the affected party." *Id.* at 762; *accord Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993) ("*Eaton* decided . . . that a district court may not act *sua sponte* to grant relief from judgment through Rule 60(b)."). Here, no motion for Rule 60(b) relief was made. Accordingly, under our precedents the order vacating the relief exceeded the district court's authority.

We also note that even if the district court had the authority to vacate the order, district courts should not use their authority under Rule 60(b) to reward parties' contempt of prior orders. The initial district judge had imposed the fine after carefully considering the factors required under 33 U.S.C. § 1319(d), and the fine's purpose was to punish violations of the Clean Water Act, not to induce these offenders to remedy the violation. Of course, if any of the considerations listed in § 1319(d), such as the economic impact that the judgment would have on the offenders, had changed, relief from the judgment might have been appropriate. Similarly, upon motion of a party, the district court might have used its Rule 60(b) authority to grant relief in the presence of "exceptional or extraordinary circumstances" that this court held are necessary for relief under Rule 60(b)(6) in *Hopper v. Euclid Manor*

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[1] (...continued)
such relief *sua sponte*."); *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 351 (9th Cir. 1999) (reasoning that although rule says "on motion," it "does not explicitly say 'by a party,'" suggesting that the relief could be on the court's own motion); *McDowell v. Celebrezze*, 310 F.2d 43, 44 (5th Cir. 1962) ("The Court could initiate this on its own motion."); *United States v. Jacobs*, 298 F.2d 469, 472 (4th Cir. 1961) ("The rule need not necessarily be read as depriving the court of the power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than a motion.").

Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). However, those circumstances are not present here. Rather, the only unusual circumstance present was that the defendants intransigently refused to comply with the district court's order to allow access to the property for remediation. Vacating a prior order for the sole purpose of inducing compliance with another order would reward contempt.

This case is somewhat analogous to the circumstances that we faced in *Hopper*. There, a prevailing plaintiff was required to pay certain costs pursuant to Rule 68, because the plaintiff had refused the defendant's offer to settle for an amount that turned out to be greater than the nominal damages that the plaintiff was ultimately awarded. The district court then used Rule 60(b)(6) to vacate the earlier judgment in favor of the plaintiff, and the court entered judgment in favor of the defendant, a move that rendered Rule 68 inapplicable. *See Hopper*, 867 F.2d at 293. We reversed, because the district court had "sought to negate the operation of Rule 68," which encourages plaintiffs to consider settlement offers seriously lest the plaintiff win a smaller judgment and be forced to pay costs, and because granting Rule 60(b) relief would reward the plaintiff's refusal to accept an appropriate settlement offer. *Id.* at 294-95. Similarly, here, granting relief from the civil penalty served to reward the defendants' refusal to comply with court orders.

The district court's sole purpose in vacating the civil fine here was not, of course, to reward the defendants' disregard of the law. The district court's primary purpose appears to have been to remedy the violation of the Clean Water Act. That purpose was appropriate, and Judge Woods noted that the hearing on the emergency motion to comply had resulted in a new settlement. There was, however, nothing to settle: Judge Cleland had already determined that Alice Pauley and Joseph Morrison had an obligation to permit contractors to remedy a violation, and he had ordered them to comply. The problem

was not that the parties failed to agree on an appropriate resolution, but that Alice Pauley and Joseph Morrison had refused to fulfill their court-ordered obligations. Alice Pauley's and Joseph Morrison's blatant refusal to comply with a court order would have warranted contempt proceedings, but certainly not a reward for their obstruction.

III. CONCLUSION

Because the district court did not have the power to vacate the civil penalty *sua sponte*, we **REVERSE** and **REMAND** for reimposition of the fine.

Appendix F–1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMUEL PAULEY; ALICE PAULEY; JOSEPH MORRISON; and JOHN HORVATH,

Defendants.
_____/

Case No. 99-CV-71069-DT

ORDER GRANTING "PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT"

Plaintiff United States of America ("the Government") brought this action against Defendants Samuel Pauley, Alice Pauley, and Joseph Morrison, alleging that they had violated Section 404 of the Clean Water Act, 33 U.S.C. § 1344, by placing, or causing to be placed, fill material in a wetland adjacent to a water of the United States without first securing a permit from the United States Army Corps of Engineers. The instant motion for summary judgment was filed by the

Government on August 25, 2000. Defendants failed to file a timely response.[1]

I. BACKGROUND

Defendants own property located at 3010 Green Drive, Harsens Island, Michigan. At the front of the site is a grandfathered fill area, on which a building that was formerly a gas station is situated. The Corps of Engineers, however, alleges that in June 1994 it discovered a recent, unpermitted fill in the wetland behind the gas station. Specifically, the Government alleges that Defendants violated the Clean Water Act (1) by depositing and grading fill material into the wetland area and (2) by digging up, repairing, and then reburying a broken water line located in the wetland area.

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534,

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[1] After the hearing on this matter had been cancelled, counsel for Defendants did fax to the court a one-page "Summary of Oral Argument to be Given in Open Court." The facsimile, however, was both untimely and in violation of Federal Rule of Civil Procedure 5. Moreover, the substance of Defendants' proposed argument—that the entire property is grandfathered out of the Clean Water Act—was unavailing. Under the Act's grandfather clause, only certain activities occurring prior to 1977, not property itself, are excluded from the Act's coverage. *See* 33 C.F.R. § 330.3. The activities alleged in this case do not qualify under this grandfather provision.

1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Failure by the non-moving party to respond to a motion for summary judgment is not necessarily fatal to that party's case. The movant bears the initial burden on summary judgment and to prevail must demonstrate the absence of a genuine issue as to all material facts. Only then does the burden shift to the non-movant and the failure to respond become fatal. Accordingly, if the Government can demonstrate that all elements of its cause of action are satisfied, summary judgment should be granted based on Defendants' failure to respond. If, on the hand, the Government's prima facie case is incomplete, summary judgment should be denied. *See Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991).

III. DISCUSSION

The Clean Water Act prohibits the discharge of any pollutant, from a point source, into navigable waters. 33 U.S.C. §§ 1311(a), 1344, 1362(12) (1986). The Secretary of the Army is authorized, however, to grant permits authorizing the discharge of "dredged material" and "fill material" under certain conditions. 33 U.S.C. §§ 1311(a), 1344. Therefore, to satisfy its burden under Rule 56, the Government must show that no material questions of fact remain as to whether (A) Defendants discharged a pollutant, (B) from a source point, (C) into navigable waters, (D) without a permit. Because the United States has satisfied this burden, and because Defendants have failed to otherwise raise a genuine issue of material fact, the Government's motion for summary judgment will be granted.

A. Defendants Discharged a Pollutant

The phrase "discharge of a pollutant" is defined under the Clean Water Act as "the addition of any pollutant." 33 U.S.C. § 1362(12). "Pollutant" is defined to include, among other

things, dredged spoil,[2] biological materials, rock, sand, and cellar dirt. The Government alleges that Defendants discharged a pollutant in essentially two ways: (1) by placing and grading fill material into the wetlands and (2) by digging a trench in the wetland area, sidecasting the dirt, and then refilling the trench.

These actions unquestionably constitute the "discharge of a pollutant" within the meaning of the Clean Water Act. First, bringing fill material and dumping and grading it into a wetland is the core example of "adding a pollutant." Second, while initially it may be less clear that sidecasting material dredged from a wetland area back into the wetland is "the addition of a pollutant," all federal courts addressing the issue have concluded that such acts indeed violate the Clean Water Act. *See, e.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-35 (5th Cir. 1983) (holding that interpretation of "addition" to include "redeposit" of trees and vegetation dredged or excavated from the wetland itself is consistent with both the purposes and legislative history of the Clean Water Act); *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (quoting *Avoyelles*, 715 F.2d at 924 n.43 ("'[D]redged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute.")); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (adopting similar holding).

Defendants have acknowledged in deposition testimony their responsibility for the alleged acts. All three Defendants have ownership interests in the property, (Answer ¶¶ 2, 3), and deposition testimony shows that Defendants Samuel Pauley and Joseph Morrison either performed, or hired Defendant John Horvath to perform, the work done in the wetland area,

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[2] Dredged spoil is "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2.

(Morrison Dep. at 15, 19, 23; Horvath Dep. at 13). In the absence of exculpatory evidence from Defendants, this is sufficient to satisfy the Government's burden under summary judgment of showing that Defendants discharged a pollutant.

B. From a Point Source

To constitute a violation of the Clean Water Act, a pollutant must be discharged from a "point source," which is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(12), (14). Courts unanimously have held that earthmoving equipment such as dump trucks, bulldozers, and backhoes qualify as "discernible, confined and discrete conveyance[s]" and are thus point sources of pollution. *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525 (W.D. La. 1979).

The Government alleges that Defendants discharged pollutants using a backhoe and a plow blade attached to a truck. These allegations are supported by the deposition testimony. (Morrison Dep. at 19, 22-23.) Accordingly, this element has been satisfied for purposes of summary judgment.

C. Into Navigable Waters

Defendants can be liable under the Clean Water Act only if they discharged pollutants into "navigable waters." 33 U.S.C. § 1362(12). Navigable waters is defined as "waters of the United States," which in turn is defined to include "wetlands . . . which could affect interstate or foreign commerce," including wetlands which are adjacent to interstate waters or their tributaries. 343 C.F.R. § 328.3(a). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the

United States Supreme Court upheld this definition as within the scope of authority granted by Congress.

The Government has satisfied its burden of showing that the land on which the pollutants were dumped is a wetland covered by the Clean Water Act. The Government has submitted the declarations of Jean Battle, a Corps of Engineers biologist, and Donald Tilton, a doctor of botany and a Certified Professional of Wetland Scientist. Both testify that the subject property is a wetland as defined by the regulations and support their testimony with factual data. In addition, the wetland is adjacent to the St. Clair River, which is an interstate water or a tributary of interstate waters. Accordingly, for purposes of summary judgment, the Government has satisfied its burden of showing that the pollutants were discharged into navigable waters.

D. Without a Permit

It is undisputed that no permit was issued authorizing the discharge of pollutants. No recorded permit has been located with the Corps of Engineers. And, although in their Answer Defendants neither denied nor admitted the absence of a permit, Defendant Morrison testified in deposition that "I never applied for a permit at any time, expressed an interest for applying for a permit because I believe the property is not a wetland." (Morrison Dep. at 33.)

III. CONCLUSION

Because the Government has demonstrated that no genuine issue of material fact exists with regard to whether Defendants discharged a pollutant, from a point source, into navigable waters of the United States, without a permit, it has satisfied its burden imposed under Federal Rule of Civil Procedure 56.

Accordingly, IT IS ORDERED that Plaintiff's motion for summary judgment against Defendants Samuel Pauley, Alice Pauley, and Joseph Morrison is GRANTED.

FURTHER IT IS ORDERED that Plaintiff shall file a brief regarding the scope and necessity of an injunctive order and the amount of a civil penalty by November 13, 2000. Defendants shall file a response brief by November 27, 2000. A hearing on the matter will be held on December 13, 2000 at 2:00.

/s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: Oct. 31, 2000.

Appendix G–1

No. 05-1552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	ORDER
	)	
v.	)	Filed
	)	August 25, 2006
ALICE MORRISON, ET AL.,	)	
	)	
Defendants-Appellants.	)	

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and RUSSELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

* Hon. Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

Appendix H-1

CITATION OF SUPPLEMENTAL AUTHORITY
FEDERAL RULES OF CIVIL PROCEDURES
RULE 28(J)

Case Number 05-1552
Decided April 26, 2006

United States Court of Appeals
for the Sixth Circuit

United States of America
Plaintiff-Appellee,
v.
Alice Morrison: Joseph Morrison
Defendants-Appellants.

This is [sic] inform the Court of the recent decision made by the United States Supreme Court in *Ramanos* [*sic*] *vs. U.S.A.*, S. C. Docket number 04-1034, argued Feb 21, 2006 - Decided June 19, 2006 that may help the Court render it's decision. In the appellants brief page 4, and pages 6-9 the defendants argue the "Nexus Theory."

Respectfully submitted,

/s/ Keay Fallowfield

Keay Fallowfield
Attorney at Law
60 N. Howard Street
P.O. Box 162
Croswell, Mi. 48422
810-679-3660

Counsel for Appellant

Appendix I–1

Text from the United States District Court's docket report.

* * * *

03/30/2001	70	ORDER by Judge Robert H. Cleland, assessing a civil penalty as to defendants Alice Pauley Morrison and Joseph Morrison, only with proof of mailing [EOD Date 4/2/01] (dh) (Entered: 04/02/2001)
03/30/2001	71	JUDGMENT entered by Judge Robert H. Cleland for USA against Joseph Morrison, Alice Pauley with proof of mailing [EOD Date: 4/2/01] (dh) (Entered: 04/02/2001)

* * * *

06/07/2001	88	ORDER by Judge George E. Woods, vacating the judgment awarding plaintiff a civil penalty from defendants Alice Pauley Morrison and Joseph Morrison in the amount of $25,000.00 entered by Judge Cleland on 03/30/01, is vacated, plaintiff's oral motion for reconsideration of the vacating of the judgment of $25,000.00 is denied. Defendants Alice and Joseph Morrison's motion for a stay pending appeal is denied. (see order for further details) [EOD Date 6/28/01] (dh) (Entered: 06/28/2001)

* * * *

Appendix J–1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT CF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CIVIL NO. 99-71069
Plaintiff,	HON. ROBERT H. CLELAND

vs.

SAMUEL PAULEY, ALICE PAULEY, JOSEPH MORRISON, and JOHN HORVATH, Jointly and Severally,

Defendants.
_____/

PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS PAULEY AND MORRISON

NOW COMES Plaintiff, United States of America, by and through its attorneys, Saul A. Green, United States Attorney and Geneva S. Halliday, Assistant United States Attorney, and moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 as to Defendants Samuel Pauley, Alice Pauley and Joseph Morrison, only. Plaintiff relies on the attached brief, declarations of Dr. Tilton and Jean Battle with attachments, and the depositions of Joseph Morrison and John Horvath

previously filed in this matter in support of Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

SAUL A. GREEN
United States Attorney

/s/ Geneva S. Halliday
GENEVA S. HALLIDAY (P28140)
Assistant U.S. Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226-3211
(313) 226-9778

Dated: August 25, 2000

Appendix K–1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CIVIL NO. 99-71069
Plaintiff,	HON. ROBERT H. CLELAND

vs.

SAMUEL PAULEY, ALICE PAULEY, JOSEPH MORRISON, and JOHN HORVATH, Jointly and Severally,

Defendants.
_____/

DECLARATION OF DONALD L. TILTON, Ph.D.

I, Donald L. Tilton, in lieu of an affidavit as permitted by 28 U.S.C. § 1746, do hereby declare and state as follows:

1. From 1996, to the present I have been President of Tilton & Associates, Inc. which is a private consulting firm that specializes in wetland management, ecological restoration, and resource policy. In 1975, I received my Ph.D. in botany from the University of Minnesota. In 1996, I became a Certified Professional of Wetland Scientist.

2. Attached to this declaration is my curriculum vitae which is hereby incorporated by reference.

3. I was retained by the United States of America to conduct a wetland delineation for a parcel of land located at the corner of M-154 and LaCroix Road on Harsen's Island, Michigan. The property I was retained to do the wetland delineation on were Lots 1249 and 1250 of Supervisor Roy T. Gilbert's Plat No. 14, Clay Township, County of St. Clair; commonly known as 3010 Green Drive, Harsens Island, Michigan.

4. On November 1, 1999, I visited the site commonly known as 3010 Green Drive, Harsens, Island, Michigan, and conducted an investigation in order to do a wetland delineation.

5. As part of this investigation the following resources were used. Aerial photographs of the site, Corps of Engineers Wetlands Delineation Manual, Waterways Experiment Station, U.S. Department of Army, Corps of Engineers, 1987; Hydric Soils of the State of Michigan, National Technical Committee for Hydric Soils, U.S. Department of Agriculture, Soil Conservation Service, 1985; Soil Survey of St. Clair County, Soil Conservation Service, United States Department of Agriculture; Wetland Plants of the State of Michigan (1988), Fish and Wildlife Service, United States Department of Interior; and field inspection reports (various dates) by Corps of Engineers personnel.

6. The methods I used to delineate wetlands are described in the 1987 Corps of Engineers Wetland Delineation Manual. The methods used in the field include evaluation of plant species dominance, soil characteristics and observations of the evidence of hydrology. This particular delineation required use of techniques developed for disturbed or atypical sites because the site had been filled and the vegetation was maintained in a mowed condition. The procedures described include evaluation of plant species, soil characteristics and evidence of temporary or seasonal hydrology. These

procedures are typically utilized in all Tilton & Associates, Inc. wetland determinations in the State of Michigan.

7. The property at 3010 Green Drive, Harsens Island, Michigan, consisted primarily of mowed open fields with a few scattered trees. There is a building on the road frontage. My wetland delineation identified two wetlands on the property that are separated by a layer of fill that had been placed in the wetlands. It appears from the soil profile and characteristics that the wetlands were once a single wetland until the wetland was divided by the fill activities. The delineation lines were marked with pink "Wetland Delineation" flagging on pin stakes. The wetlands identified on the property is an emergent wetland type.

8. The vegetation on the site was a strong indicator of wetland presence. Plant species observed in the disturbed wetland area included: Reed canary grass (*Phalaris arundinacea*) FACW+; Purple loosestrife (*Lythrum salicaria*) OBL; Soft stem bulrush (*Juncus effusus*) OBL; Common reed (*Phragmites australis*) FACW+. Wetland species observed in the wetland adjacent to the disturbed area included the above species as well as silky dogwood (*Cornus amomum*) and a species of sedge (Carex sp.). The dominant plants in the wetland area were all considered hydrophytic plant species.

9. Standing water was not observed in the wetland area at the time of field investigation in November 1999, but there was visible evidence of saturation in the soil borings taken in the wetland area. In most instances, soil auger tests indicated saturated soils beneath the fill within twelve inches of the surface wetland soil horizon.

10. Soils on the site tended to be uniform except for variation in the thickness of fill placed over hydric soils (see attached photographs). A total of four soil pits and soil borings were investigated in the undisturbed wetland and seven soil pits and soil borings were observed in the fill area. The soil profile

in the undisturbed wetland area showed a black organic muck surface horizon six inches thick. Beneath the organic muck surface horizon there was a layer of silty fine sand with organic streaking. The soil color of the silty fine sand was 10 YR 7/3. Live roots were observed in the soil horizons. Soil borings taken in the till area showed an unconsolidated layer of fill consisting of mostly silty sand. The silty sand fill layer overlayed a dark black organic soil that was typically 6-8 inches thick. Beneath the organic soil layer there was a soil with a silty sand character with organic streaking similar to the soil observed in the undisturbed wetland. Within the buried organic soil horizon, live roots were observed indicating that the soil horizon was recently buried.

11. My investigation of this property indicated that based on the observance of a predominance of hydrophytic plant species, hydric soils and evidence of wetland hydrology, there are wetlands on this property that meet the criteria of wetlands under Section 404 of the Clean Water Act.

12. My investigation, including my soil investigation, further showed that fill material had been placed in wetland areas on the property in question. A sketch of the fill area that I prepared on November 1, 1999 is attached hereto.

I affirm that the information contained herein is true and accurate.

[no signature]
DONALD L. TILTON, Ph.D.

Appendix L–1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CIVIL NO. 99-71069
Plaintiff,	HON. ROBERT H. CLELAND

vs.

SAMUEL PAULEY, ALICE PAULEY, JOSEPH MORRISON, and JOHN HORVATH, Jointly and Severally,

Defendants.
_____/

DECLARATION OF JEAN BATTLE

I, Jean Battle, in lieu of an affidavit as permitted by 28 U.S.C. § 1746, do hereby declare and state as follows:

1. From 1992 to 1999, I was employed by the U.S. Army Corps of Engineers, Detroit District. From 1992 to 1997, I was a Biologist in the Enforcement Section of the Regulatory Branch, Corps of Engineers. I graduated from the University of Michigan in 1988 with a Bachelor of Science in Natural Resources.

2. On June 16, 1994, having completed an inspection of another property on Harsens Island, Michigan, I was on my way to the ferry when I observed recent fill material on a site

vegetated with wetland plants. The site was on M-154 behind a Mobile Gas Station on Harsens Island.

3. I observed fresh, sandy subsoil material with no vegetation, that did not conform to the contours of the vegetated land surrounding it on the site. The material was mounded in some areas in piles and had been flattened in other areas, and was above the grade of the surrounding vegetated landscape. The material was a light color that indicated that it was a mineral subsoil layer, not a dark organic soil that would normally be found as the surface soil layer of a wetland in the Harsens Island area. The bare material had been placed in an area heavily vegetated with wetland species of sedges and grasses. I also observed fresh track marks of heavy equipment on some of the fill.

4. On June 16, 1994, I took the photographs of the fill area. At the time I placed the photographs together to show the area. Copies of these photographs are attached to this declaration as Exhibit A and incorporated by reference.

5. The address of the property where the fill had been placed in a wetland was 3010 Green Drive, Harsens Island, St. Clair County, Michigan. The register of deeds indicated that the owners were defendants Samuel and Alice Pauley.

6. I spoke with defendant Alice Pauley who indicated that the fill had come from the removal of an underground storage tank. Defendant Joseph Morrison, originally told me that the fill material was already on site. When I pointed out that the fill was obviously new, he recanted this statement. He indicated that the property deed did not say that the property was a wetland. See Conversation Record dated June 16, 1994, and attached as Exhibit B to this Declaration.

7. I advised Alice Pauley I would conduct an inspection to determine if the site was a wetland. On July 8, 1994, I

inspected the site. The report I prepared on July 13, 1994 of my July 8, 1994 inspection is attached as Exhibit C.

8. I determined that the property was a wetland within the Corps of Engineers jurisdiction under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

9. Hydrophytic vegetation was present in the area of the fill. The wetland was an Emergent (cattail, rushes, etc.) and Wet Meadow (wetland grasses, sedges, and herbaceous vegetation) type wetland. One hundred percent of the dominant species in the areas adjacent to and under the fill material were wetland indicators.

10. Wetland hydrology was also present. I dug several test pits and the water was within 10" of the surface in the undisturbed areas or 20" of the surface in the filled areas.

11. Hydric soils, which are wetland indicators, were present under the sandy land fill material on the site and next to it, in adjacent undisturbed portions of the site.

12. I examined previous aerial photos of the site area including 1984 aerial photographs, copies attached. The 1984 aerial photographs showed existing ("grandfathered") fill on the east side of the building. Also, there was some fill on the north and west sides of the building that showed only in five year old photographs; however, I also considered this fill grandfathered for purposes of my inspection and enforcement action. Based on my evaluation of the aerial photos and my inspection of the site on June 16, 1994 and July 8, 1994, I determined that approximately .65 acres and approximately 1,020 cubic yards of new, unauthorized fill had been recently placed in the wetland, north and west of the mobile station on the property owned by Samuel and Alice Pauley.

13. Based on my inspection of aerial photographs from prior to 1994 and my inspection of the site, I, at the time, prepared the sketch that is attached to my inspection report and

the sketch that is attached hereto as Exhibit D. The area marked "unauthorized fill," outlines the area of the obviously new, freshly placed unauthorized fill that I observed on June 16, 1994, on the property on Harsens Island, Michigan owned by defendants Samuel and Alice Pauley.

14. I reviewed the Corps of Engineers permit files and determined that no permits had been issued for fill on the property in question.

15. By letter dated July 25, 1994, Alice Pauley indicated that it was their intention to voluntarily restore the property to the satisfaction of the Corps of Engineers. See letter attached as Exhibit E.

16. I met and spoke several times with Alice and Samuel Pauley regarding this restoration of the site. Alice Pauley indicated that some of the fill also came from the installation of a water line that had occurred in the winter of 1994 and that the contractor had done a poor job of refilling the trench, instead spreading the material across the wetland. The Pauleys had several excuses over the ensuing years for delaying voluntarily restoring the site including: could not find a contractor; wanted to get the same contractor, John Horvath, who placed the fill to remove it; and financial hardship. Eventually, they stopped responding to letters and phone calls.

I affirm that the information contained herein is true and accurate.

/s/ Jean Battle
JEAN BATTLE

Date: 8/17/00

Appendix L–5

* * * *

Exhibit C

CENCE-CO-L 94-012-073-0 July 14, 1994

MEMORANDUM FOR: File

SUBJECT: Pauley property, Section 404 violation, Harsen's Island, MI

1. Inspection on 16 June 94 and 8 July 94 showed discharge of fill material and grading in wetland adjacent to St. Clair River. Some material came from excavation of leaking underground storage tanks at the old gas station on the property. Filled and graded area is irregular in shape and fill depth, approx. .65 acres, and 1020 cubic yards.

2. 1984 Aerial shows some existing fill on the east side of the building. In addition, some fill near the north and west sides of the building appears to be at least five years old.

3. Recommendation: Send violation letter. Grandfather area of fill as shown on field sketch and have owner either apply for remainder or restore site.

/s/ Jean Battle
JEAN BATTLE
Project Manager
Regulatory Functions Branch

* * * *

Appendix L–6

CENCE-CO-94-012-073-0 DATE 13 July 94

MEMORANDUM FOR Chief, Regulatory Functions Branch

SUBJECT: Inspection Report of Mobile Service Station, Harsen's Island, MI

1. Owner/Permittee Alice Pauley

* * * *

[x] Jurisdiction
- [ ] No work/wetlands in Corps jurisdiction
- [ ] Section 10
- [x] Section 404
- [x] Wetlands (Determination Forms attached)
  - [x] Adjacent to: St. Clair River
    - [x] Below Headwaters
    - [ ] Above Headwaters
  - [ ] Isolated: Size of Wetland Complex ___

* * * *

Appendix L–7

16 June 94
DATE OF INSPECTION 8 July 94
DATE REPORT PREPARED 13 July 94

INSPECTORS REPORT

Waterway (County) St. Clair River (No. 012) File No. 94-012-073-0

Name(s) of Land Owner(s) Alice Pauley

* * * *

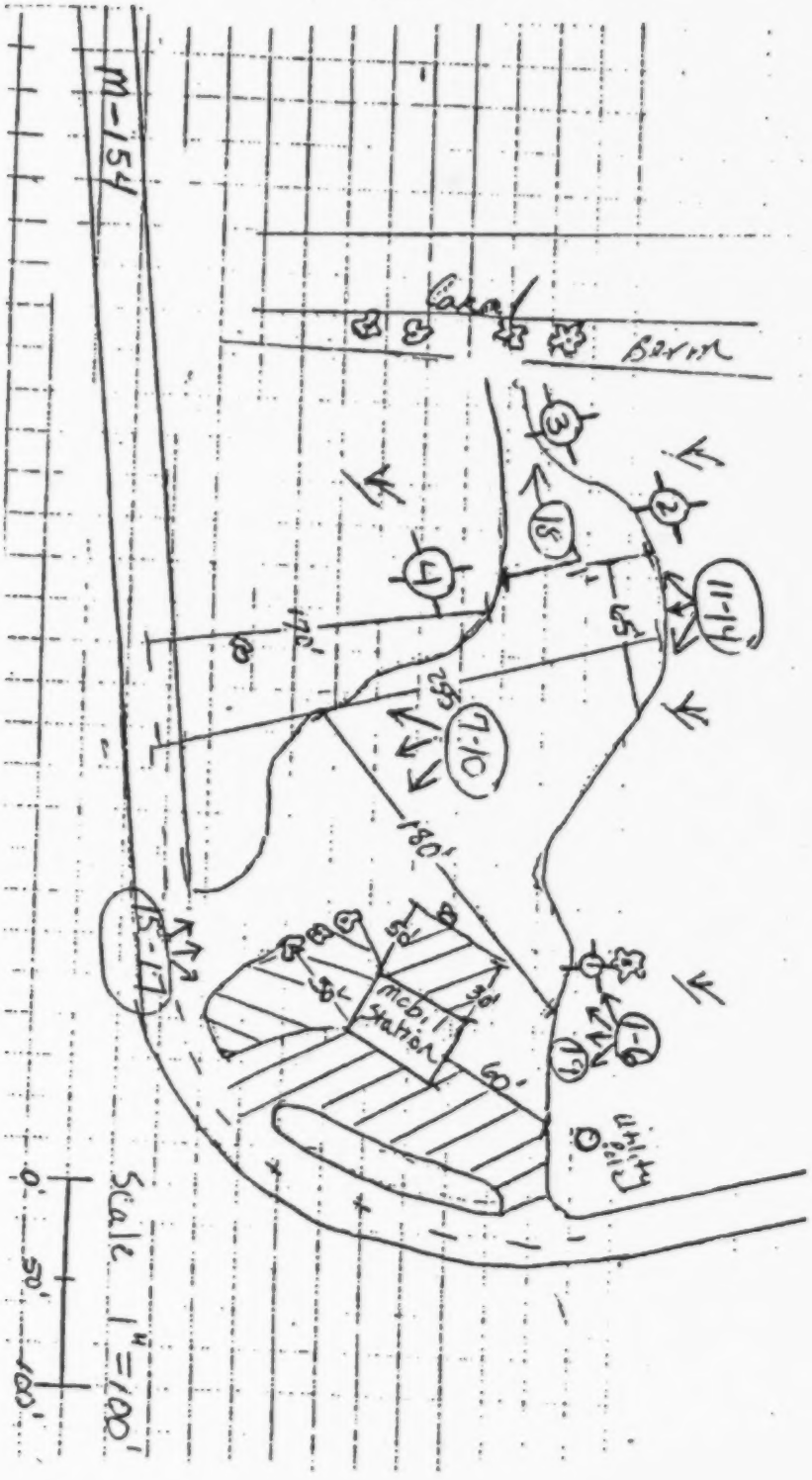
X Wetland Adjacent to Section 10 Water Tributary to Navigable Water

Signature of Investigator /s/ Jean Battle
JOB TITLE

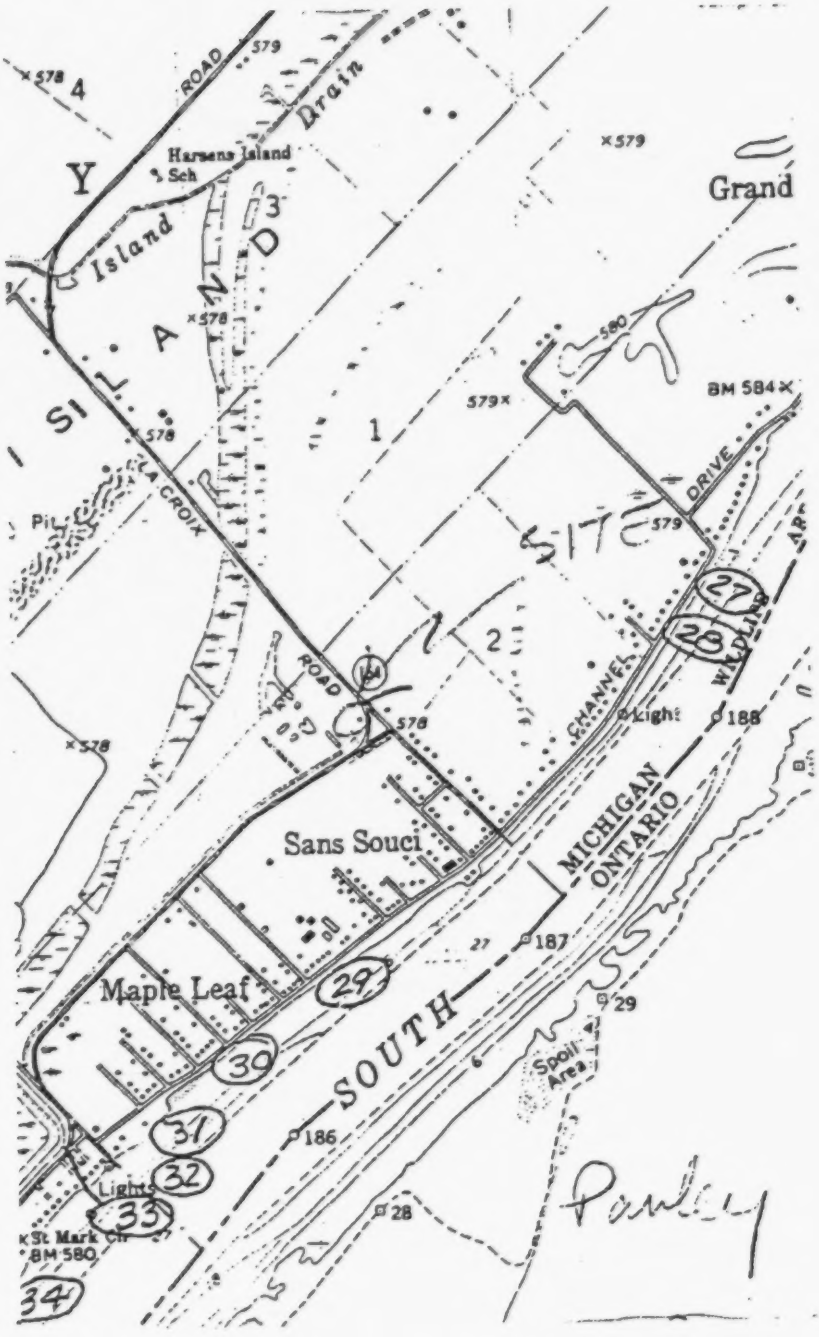
* * * *

BEST AVAILABLE COPY

Appendix L–8
Exhibit C



Appendix L–9
Exhibit D



Appendix M–1

Detroit District
U.S. Army Corps of Engineers

File Number 94-012-073-0

Department of the Army Permit Evaluation
MORRISON - ATF FILL

* * * *

b. Operational Impacts:

The existing work adversely impacts an area that filters rainfall, runoff, groundwater, and floodwaters by eliminating 0.65 acres of wetlands, and would replace it with a new source area for runoff pollutants. Pollutants from this area may include lawn fertilizers, herbicides, and pesticides. This would cause a long-term negative impact on water quality, as more water with less filtering time enters the road side ditches and goes directly into the canal system. The cumulative impact of similar discharges in wetlands along the waterway will increase the minor adverse impacts to water chemistry, temperature, and turbidity. Overall, the operation and use of the activity has a minor, long term, negative impact on water quality.

* * * *

(1)

FILED
JAN 2 1 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-749

In the Supreme Court of the United States

JOSEPH MORRISON AND ALICE MORRISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
MATTHEW J. MCKEOWN
Acting Assistant Attorney General
KATHERINE W. HAZARD
JOHN EMAD ARBAB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the wetlands at issue in this case, which are adjacent to navigable-in-fact waters, are "waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

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In the Supreme Court of the United States

No. 06-749

JOSEPH MORRISON AND ALICE MORRISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 178 Fed. Appx. 481. A prior opinion of the court of appeals (Pet. App. E1-E9) is reported at 321 F.3d 578. The order of the district court (Pet. App. B1-B2) and the report and recommendation of the magistrate judge (Pet. App. B3-B7) are unreported. Prior orders of the district court (Pet. App. C1-C2, F1-F7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2006. A petition for rehearing was denied on August 25, 2006 (Pet. App. G1). The petition for a writ

of certiorari was filed on November 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.)* (Clean Water Act or CWA). The government alleged that petitioners had discharged fill material into "the waters of the United States" without a permit, in violation of 33 U.S.C. 1311(a) and 1344. In October 2000, the district court granted the government's motion for summary judgment, holding that petitioners' unpermitted discharges into wetlands adjacent to the St. Clair River were in violation of the CWA. Pet. App. F1-F7. Petitioners were ordered, inter alia, to pay a civil penalty of $25,000. *Id.* at E3-E4.

Nearly four years after entry of judgment for the United States, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), claiming that the facts did not establish a violation of the CWA and that the federal courts lacked jurisdiction over the relevant site. Pet. App. B6. In March 2005, the district court denied petitioners' motion, which the court reviewed under the standard set forth in Federal Rule of Civil Procedure 60(b)(6) for relief from a judgment. Pet. App. B1-B2. The court of appeals affirmed. *Id.* at A1-A5.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act.

33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1), as well as wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps' regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its pow-

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

ers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water,"

126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

3. Petitioners own property on Harsens Island, Michigan, adjacent to the St. Clair River, which is a navigable-in-fact waterway. See Pet. App. A5, F2, F6; Pet. 5, 8. In March 1999, the United States filed a complaint against petitioners (and others) alleging that they had violated the CWA by filling wetlands on petitioners' property without a permit. Pet. App. E2; see *id.* at F2.[3]

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

[3] At the time of the filing of the complaint, petitioner Alice Morrison was known as Alice Pauley. Pet. App. F2. She subsequently married

On October 31, 2000, the district court (per Cleland, J.) granted the United States' motion for summary judgment with respect to liability. *Id.* at F1-F7. The court found that petitioners' discharges were into "navigable waters" covered by the CWA because the wetlands at issue are adjacent to the St. Clair River. *Id.* at F6.

At a penalty hearing held on February 8, 2001, the United States proffered the district court a consent decree. Under the consent decree, defendant Samuel Pauley agreed to hire a contractor to remove all fill material from the wetlands by May 15, 2001. Pet. App. E3.[4] The consent decree was contingent on either Samuel Pauley's receiving permission from petitioners to enter the property or the issuance of a court order requiring petitioners to permit him access. *Ibid.* The district court ordered petitioner Alice Morrison to "allow access to the property by the [c]ontractor and Corps of Engineers to complete the restoration as set forth in the consent decree." *Ibid.* The court also ordered petitioners to pay a $25,000 civil penalty, noting petitioners' history of refusing to comply with the law and their failure to keep their earlier promises to remedy the violation. *Id.* at E3-E4. No appeal was taken from the district court's judgment.

Notwithstanding the district court's order, petitioner Alice Morrison refused to grant Samuel Pauley's contractor and the Corps access to the property. Pet. App. E4. On May 9, 2001, the United States filed an emergency motion to enforce the consent decree. *Ibid.* Judge Cleland disqualified himself, and the matter was

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petitioner Joseph Morrison. *Id.* at B3.

[4] Samuel Pauley is Alice Morrison's father. Pet. App. E2; see note 3, *supra*. He is not a petitioner in this Court.

reassigned to Judge Woods. *Ibid.* At a hearing on the government's emergency motion, the district court *sua sponte* vacated the $25,000 civil penalty. *Id.* at E4-E5. The United States appealed. The court of appeals reversed and remanded the case for reimposition of the $25,000 civil penalty. *Id.* at D1, E1-E9; see *id.* at C1-C2 (reinstating civil penalty on remand). This Court denied petitioners' petition for a writ of certiorari, *Morrison* v. *United States*, 540 U.S. 877 (2003), and their subsequent petition for rehearing, *Morrison* v. *United States*, 540 U.S. 1070 (2003).

4. When petitioners refused to pay the $25,000 civil penalty, the United States initiated garnishment proceedings. On April 22, 2004, a magistrate judge denied petitioners' motion to stay execution of garnishment. Pet. App. B4. On September 16, 2004, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pet. App. B4. The magistrate judge recommended that petitioners' motion be denied. *Id.* at B3-B7. The magistrate judge explained that "[f]inal judgment was entered almost four years ago and it was found then * * * that there were sufficient facts to establish a violation of the Clean Water Act." *Id.* at B6. The magistrate judge found no basis for granting petitioners relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Pet. App. B6. The district court adopted the magistrate judge's report and recommendation and denied petitioners' motion to dismiss. *Id.* at B1-B2.

5. The court of appeals affirmed. Pet. App. A1-A5. The court noted that petitioners did not dispute that "[t]he wetlands in question are adjacent to the St. Clair River." *Id.* at A2. The court of appeals observed that, under this Court's decision in *SWANCC*, "there must be

a 'significant nexus' between the wetlands and navigable waters in order for the United States to have jurisdiction over the wetlands in question." *Id.* at A4 (quoting *SWANCC*, 531 U.S. at 167). A "significant nexus" exists, the court explained, when the wetland is "adjacent to a navigable body of water." *Ibid.* The court concluded that the wetlands at issue here are covered by the CWA because those "wetlands are adjacent to the St. Clair River" and "the St. Clair River is a navigable body of water." *Id.* at A5.

The court of appeals issued its decision on April 26, 2006. Pet. App. A1. On June 6, 2006, petitioners filed a petition for rehearing and rehearing en banc. While that petition was pending, this Court issued its decision in *Rapanos*. Petitioners then brought *Rapanos* to the court of appeals' attention pursuant to Federal Rule of Appellate Procedure 28(j). Pet. App. H1. The court of appeals subsequently denied the petition for rehearing and rehearing en banc without comment. *Id.* at G1.

ARGUMENT

Petitioners contend (Pet. 5, 8-14) that the judgment of the court of appeals should be vacated and the case should be remanded for reconsideration in light of *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). That disposition is unwarranted. The Sixth Circuit's opinion makes clear that application of the standards endorsed by a majority of this Court in *Rapanos* would not alter the outcome here. Indeed, the court of appeals had *Rapanos* before it when the court denied petitioners' request for rehearing. And because petitioners seek in this proceeding to reopen a final judgment, they are entitled to prevail only if they can establish one of the bases for relief set forth in Federal Rule of Civil Proce-

dure 60(b)—a burden they make no attempt to satisfy. The petition for a writ of certiorari therefore should be denied.

1. Under the Corps' regulations implementing the CWA, the term "waters of the United States" is defined to include all wetlands "adjacent to" other covered waters. 33 C.F.R. 328.3(a)(7). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). A finding of adjacency under the regulations does not depend on a showing of a hydrological connection between a wetland and another covered water.

In a ruling issued before this Court's decision in *Rapanos*, the court of appeals in this case sustained the categorical approach to adjacent wetlands reflected in the Corps' regulations. See Pet. App. A4-A5 (finding CWA jurisdiction based on the wetlands' adjacency to a navigable body of water). In *Rapanos*, however, five Members of this Court concluded that the pertinent regulatory provisions are overbroad insofar as they define the term "waters of the United States" to encompass *all* wetlands adjacent to other covered waters. See 126 S. Ct. at 2227 (plurality opinion) (concluding that a wetland is covered by the CWA only if it has a "continuous surface connection with" another covered water); *id.* at 2248-2249 (Kennedy, J., concurring in the judgment) (concluding that a wetland adjacent to a non-navigable tributary is covered only if it has a "significant nexus" to navigable-in-fact waters). When a particular wetland satisfies neither the plurality's standard nor that of Justice Kennedy, it falls outside the CWA's coverage under the approaches taken by a majority of this Court, even if it is encompassed by the regulatory definition of "waters of the United States."

2. Under a proper understanding of *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation marks omitted). Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgments" might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In these circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (concluding that the federal government can establish juris-

diction over waters that "meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*").

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

3. Petitioners contend (Pet. 8-12) that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioners' view (Pet. 10), *Marks* requires that the *Rapanos* plurality opinion be treated as the holding of the Court because the plurality's "rationale is a logical subset of Justice Kennedy's concurrence." That argument lacks merit.

In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a

relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment. Petitioner is wrong in contending (Pet. 11) that "Justice Kennedy's test would find jurisdiction in all cases where the plurality opinion would." Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he construed the statute, see *id.* at 2246, 2249.[5]

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[5] Even assuming arguendo that the plurality's approach would always be more restrictive of CWA jurisdiction than would Justice Kennedy's approach (which, as explained in text, it is not), petitioners would still be wrong in contending that the plurality's approach stated the "narrowest ground" within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest ground" in that it would reflect the narrowest disagreement with the judgment below and with the approach advocated by the four dissenters. Petitioners' contrary suggestion—that the plurality opinion must be deemed the narrowest ground for the *judgment* on the theory that it adopted the narrowest view of CWA *jurisdiction*—mixes apples and oranges and would lead to the bizarre conclusion that a rule of law expressly rejected by five Justices nonetheless was binding on the lower courts.

4. In the instant case, the court of appeals found that the wetlands at issue are adjacent to the St. Clair River. See Pet. App. A5. Petitioners do not dispute that the St. Clair River is a traditional navigable water. See Pet. 5, 8. The adjacent wetlands at issue in this case are therefore subject to federal regulatory jurisdiction under the analysis set forth in Justice Kennedy's *Rapanos* concurrence.

In his concurring opinion in *Rapanos*, Justice Kennedy stated that, "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 126 S. Ct. at 2248; see *id.* at 2249 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."). Justice Kennedy would have required the Corps to "establish a significant nexus on a case-by-case basis" only when the agency "seeks to regulate wetlands based on adjacency to *nonnavigable* tributaries." *Ibid.* (emphasis added).[6] Because the water body to which petitioners' wetlands are adjacent is a traditional navigable water, the Corps could properly assert regulatory jurisdiction over those wetlands based on "adjacency alone." *Id.* at 2248. Further review of this case under the *Rapanos* standard is

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[6] Justice Kennedy would permit the Corps, through regulation or adjudication, to "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 126 S. Ct. at 2248.

therefore unnecessary because *Rapanos* would compel the same result reached by the court below.

5. Vacatur of the court of appeals' judgment is particularly unwarranted for two additional reasons. First, the Sixth Circuit has already had the opportunity to consider the question whether the relevant wetlands are subject to federal regulatory authority under the standards set forth in the various opinions in *Rapanos*. While petitioners' petition for rehearing was pending before the court of appeals, this Court decided *Rapanos*, and petitioners then brought *Rapanos* to the court of appeals' attention pursuant to Federal Rule of Appellate Procedure 28(j). Pet. App. H1. *Rapanos* was decided on June 19, 2006, see 126 S. Ct. at 2208, and the court of appeals denied rehearing and rehearing en banc in this case on August 25, 2006, see Pet. App. G1. A remand for reconsideration is therefore unnecessary to ensure that the court of appeals is given the opportunity to assess the impact of *Rapanos* on its resolution of this case.

Second, because petitioners seek in this case to reopen a final judgment, they can prevail only by establishing one of the bases for relief set forth in Federal Rule of Civil Procedure 60(b). See Pet. App. B2, B5-B6. Petitioners make no effort to show that they can demonstrate an entitlement to relief under Rule 60(b). Although the court of appeals did not base its decision on that ground, petitioners' inability to establish the prerequisites for relief from a final judgment provides a further reason for denying review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

JOSEPH and ALICE MORRISON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err by failing to assess whether jurisdiction under the Clean Water Act extends to Petitioners' property in light of this Court's decision in *Rapanos v. United States*?

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I

THE DECISION BELOW COMPORTS WITH NEITHER THE *RAPANOS* PLURALITY'S NOR THE CONCURRENCE'S JURISDICTIONAL TEST

The government contends that, because the Sixth Circuit affirmed the district court's finding that Petitioners' property is "adjacent" to the St. Clair, a navigable-in-fact waterway, the assertion of Clean Water Act jurisdiction over Petitioners' property is proper under the test set forth in Justice Kennedy's concurring opinion in *Rapanos*. But the government's position ignores Petitioners' principal contention that pre-*Rapanos* adjacency is not coterminous with post-*Rapanos* adjacency. Although the relevant terms of art may be the same, their content, in light of *Rapanos*, has changed considerably. Therefore, vacature and remand is required to allow the lower court to apply the proper jurisdictional standard.

Relying heavily upon Justice Kennedy's comment that the Army Corps of Engineers can make the categorical judgment that all wetlands "adjacent" to navigable-in-fact waterways bear the requisite "significant nexus" to those same waterways, the government concludes that jurisdiction extends to Petitioners' property because their wetlands are "adjacent" to the St. Clair.

The government's reasoning is faulty. Justice Kennedy's opinion, when it asserts that adjacency is sufficient to establish jurisdiction, clearly bases that conclusion on the adjacency found sufficient to support jurisdiction in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *See Rapanos v. United States*, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring in the judgment) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by

showing adjacency alone."). In *Riverside Bayview*, jurisdiction was predicated upon the inability to ascertain with ease where the water ended and the wetland began. *See Riverside Bayview*, 474 U.S. at 134; *see also Rapanos*, 126 S. Ct. at 2225-26 (plurality opinion). It is for that reason that Justice Kennedy, in his *Rapanos* concurrence, concluded that the Corps can reasonably make the categorical determination that all such wetlands bear a significant nexus to navigable-in-fact waterways.

But that circumstance is not present here. As the record clearly demonstrates, Petitioners' property is distinguishable from the St. Clair. *See, e.g.*, App. at L-1, L-2 (Petitioners' property on highway "M-154 behind a Mobil Gas Station on Harsens Island"); L-6; L-8 (showing property bounded by highway and canal); L-9 (same). Arguably, Petitioners' property is adjacent to a canal, which eventually empties into the St. Clair. But there has never been a finding that the canal is itself navigable-in-fact. *Cf.* App. at L-7 (determining that Petitioners' property is a "Wetland Adjacent to Section 10 Water Tributary to Navigable Water"). Therefore, the present record *at most* supports the contention that Petitioners' property is adjacent to a nonnavigable tributary of a navigable-in-fact waterway. But under Justice Kennedy's concurrence, jurisdiction over such wetlands must be "establish[ed] [by] a significant nexus on a case-by-case basis." *See Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment).

Thus, when the Sixth Circuit stated that Petitioners' property is "adjacent" to the St. Clair, it meant that the property bears a hydrological connection to the St. Clair. But this Court in *Rapanos* rejected the hydrological connection rule. Further, the instant record is devoid of any material to support a significant nexus finding. And nowhere does the government contend that under the plurality test, jurisdiction would obtain. Therefore, vacature and remand are necessary to allow the

lower court to apply the proper jurisdictional test in light of *Rapanos*.[1]

II

THE PLURALITY IS THE CONTROLLING *RAPANOS* OPINION

Where no opinion of the Court obtains a majority of the justices' votes, the holding of the Court is expressed by that opinion joined in by the Members who concurred in the judgment on the narrowest grounds, *see Marks v. United States*, 430 U.S. 188, 193 (1977), provided that the opinion comprising the "narrowest grounds" is a logical subset of the remaining opinions agreeing with the Court's judgment. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). The government argues that neither the plurality opinion nor the concurrence of Justice Kennedy is a logical subset of the other, and that therefore it is necessary to review the position taken by the dissenting justices. The government also contends that even if the *Marks* rule were to apply, the "narrowest grounds" would be those of Justice Kennedy's concurrence.

The government is wrong on each of these points. The plurality opinion is both the "narrowest grounds" for the decision and the logical subset of Justice Kennedy's test, such that, under *Marks*, the plurality is the controlling opinion. And even if *Marks* were inapplicable, that result would still obtain. The views of dissenting justices ought to have *no* role in

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[1] The government's contention that, merely because Petitioners notified the Sixth Circuit of this Court's decision in *Rapanos* pending the consideration of their petition for rehearing, review by this Court is unmerited. But the Sixth Circuit's summary denial of the rehearing petition, ostensibly on the grounds set forth in the original panel decision, confirms either that (1) the Sixth Circuit ignored *Rapanos*, or (2) the Sixth Circuit fundamentally misunderstood the change in the law effected by *Rapanos*. Both errors call upon this Court's supervisory and remedial review.

ascertaining the holding of the Court. The Court operates through judgments, and produces precedent by explaining its judgments in written opinions. The views of dissenting justices, because they play no part in the judgment of the Court, cannot determine the Court's holding; they are the functional equivalent of advisory opinions.[2]

A. The *Rapanos* Plurality Is the Logical Subset

Under the *Rapanos* plurality, Clean Water Act jurisdiction extends to nonnavigable tributaries that contain a relatively permanent or continuous surface connection and that are traditionally denominated as streams, rivers, lakes, and the like. *Rapanos*, 126 S. Ct. at 2225 (plurality opinion). According to Justice Kennedy, the Corps has jurisdiction over nonnavigable tributaries that bear a significant nexus to navigable waters, that nexus being established where the nonnavigable tributary significantly affects the chemical, physical, and biological integrity of downstream navigable waters. *Id.* at 2248 (Kennedy, J., concurring in the judgment).

In comparing the plurality's test with his, Justice Kennedy intimated that the plurality would find jurisdiction in instances where he would not. *See id.* at 2246. But Justice Kennedy's opinion represents just that—an opinion—and nothing more as to the potential scope of the plurality's test. Clearly, the plurality considered Justice Kennedy's test to be the broader of the two. *See id.* at 2235 n.15 (plurality opinion). Moreover, Justice Stevens expressly noted that it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is

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[2] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 428 (1986) (noting that dissents do not make law). One is reminded of Justice Potter's remark, recorded by Justice Brennan, that dissents are "subversive literature." *Id.* at 429.

not." *Id.* at 2265 n.14 (Stevens, J., dissenting).[3] For purposes of applying the *Marks* rule, then, it is fair to conclude that a flow substantial enough and located within a defined channel so as to qualify under the plurality test as a water of the United States also will qualify as such under Justice Kennedy's test, whereas wetlands that are near to navigable waters yet not hydrologically connected to them, although conceivably jurisdictional under Justice Kennedy's test, *see Rapanos*, 126 S. Ct. at 2251-52 (Kennedy, J., concurring in the judgment), are assuredly beyond jurisdiction under the plurality test, *see id.* at 2226-27 (plurality opinion). Therefore, the plurality test is a logical subset of Justice Kennedy's test.

B. The *Rapanos* Plurality Is the "Narrowest Grounds" Under *Marks*

To qualify as the binding rationale of the Court under *Marks*, the *Rapanos* plurality opinion must constitute the "narrowest grounds" of those Members concurring in the judgment. The government, assuming *arguendo* that the plurality opinion is more restrictive of Clean Water Act jurisdiction than Justice Kennedy's opinion, nevertheless concludes that the latter is the narrowest ground because "it would reflect the narrowest disagreement with the judgment below and with the approach advocated by the four dissenters." Resp. at 13 n.5. The government's position is in error. The narrowest ground under *Marks* is that rationale which would most narrowly support the judgment of *this* Court, not the lower court, and which would garner the five votes of those in the majority. The plurality both supports the judgment in *Rapanos and*, as the logical jurisdictional subset of Justice Kennedy's

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[3] Petitioners cite to Justice Stevens' dissent simply to establish the reasonableness of Petitioners' position that the jurisdictional reach of the plurality's test is narrower than that of Justice Kennedy's, and not for the purpose of establishing a holding of the Court.

test, garners five votes. Therefore, the plurality opinion constitutes the "narrowest grounds" under *Marks*.

C. The *Rapanos* Dissenting Opinions Have No Effect on the Holding of the Court

In *Rapanos*, five Members of the Court voted to reverse the judgment of the Court of Appeals. Four Members dissented from that disposition. Justice Stevens, writing for all four dissenters, offered his opinion that as a result of the fractured majority, Clean Water Act jurisdiction can be proved under either Justice Scalia's or Justice Kennedy's test. Relying upon that statement, the government here contends that the views of the dissenters should inform the Court's *Marks* analysis, reasoning that the jurisdictional test announced in Justice Kennedy's concurrence is legally binding because it would receive the votes of five justices (Justice Kennedy and the four dissenters).

The government's position is jurisprudentially flawed. The federal judiciary, precluded by Article III from issuing advisory opinions, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), makes law through the decision of actual cases, and by providing, normally in written form, the reasons for those decisions. In other words, the only constitutionally permissible manner for federal courts to exercise the judicial power of Article III is through judgments in cases or controversies; but where a justice has had no role in contributing to the decision of a case or controversy, that justice's view perforce cannot enjoy the authority of Article III. The views of dissenting justices are no different, jurisprudentially speaking, than the views of justices who were not present at conference and took no part in the decision, or for that matter the views of justices expressed in nonjudicial settings, and often reflect little more

than the dissenters' "unadulterated cussedness."[4] V.H. Roberts, *Dissenting Opinions*, 39 Am. L. Rev. 23, 30 (1905).

The cases cited by the government do not require otherwise. In *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), although the Court discussed the opinions of concurring and dissenting justices, *see id.* at 2607, that discussion was intended to show that the Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), did not hold that all Equal Protection challenges to political gerrymandering are nonjusticiable. Yet that conclusion would follow under *Marks* without recourse to the dissenting opinions in *Vieth*. The *Vieth* plurality would have found all such challenges to be nonjusticiable, *see id.* at 306 (plurality opinion), whereas Justice Kennedy would not categorically foreclose the possibility of judicial challenge, *see id.* (Kennedy, J., concurring in the judgment).

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court cited various opinions in *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), for the proposition that Section 601 of Title VI of the 1964 Civil Rights Act forbids only intentional discrimination, and that Section 602 of the same permits disparate impact. *See Alexander*, 532 U.S. at 281-82. But no party contested those propositions in *Alexander*, *see id.* at 280, 282, and thus the Court was not presented with the jurisprudential question here of whether dissenting opinions can be a constitutional

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[4] Of course, this is not to imply that dissents lack value in every respect. Members of this Court have ably argued otherwise. *See, e.g.*, Brennan, *supra*; William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. Am. Jud. Soc'y 104 (1948); Harlan Fiske Stone, *Dissenting Opinions Are Not Without Value*, 26 J. Am. Jud. Soc'y 78 (1942). But whether dissents have intrinsic worth is a question obviously distinct from the constitutional issue of whether they enjoy the force of law.

conduit for the exercise of the Article III judicial power. And in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), also relied upon by the government, the Court simply referred to a dissenting opinion, *see id.* at 285, whose views the *Wilton* Court did not ultimately accept, *see id.* at 289-90. The remaining authority relied upon by the government for its *Marks* theory is not binding on this Court. *See* Resp. at 11-12 (citing to a concurrence of Justice Souter and decision of the First Circuit).

But the government's attempt to support its position that dissenting opinions can inform the Court's *Marks* analysis is flawed for a more significant reason. This Court is infallible because it is final. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). Therefore, even when it appears to rely upon a dissenting opinion to guide its decision, that reliance is if anything a de facto reversal of the correlative majority opinion. Although stare decisis and adherence to precedent is the norm for the Court, *see Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion), that policy is not without exception, *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); hence, use of dissenting opinions by this Court at most proves an inconsequential divergence of form. In contrast, for inferior federal courts to rely upon dissenting opinions of this Court presupposes the power of reversal which by definition they do not have.

Regardless of the outcome of a *Marks* analysis, the Court should not allow the views of the dissenting justices in *Rapanos* to affect its determination of the controlling legal standard for Clean Water Act jurisdiction.

III

THE APPEAL AND PETITION PRESENT "EXCEPTIONAL CIRCUMSTANCES" UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

The government erroneously here contends that Petitioners have not met their burden for relief from final judgment under Federal Rule of Civil Procedure 60(b). Because the Sixth Circuit would have had no reason to reach the merits of their appeal had Petitioners not met the standards for relief under Rule 60(b), the fact that the Court of Appeal *did* address the merits without mention of the Rule 60(b) standard demonstrates that the court impliedly found that burden to have been met. Moreover, Petitioners have shown "exceptional circumstances" meriting relief given the substantial change in the scope of Clean Water Act jurisdiction effected by the Court's decision in *Rapanos*,[5] and the paramount necessity to have the Sixth Circuit apply the correct jurisdictional standard to this and all future cases.

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[5] *Cf. Am. Econ. Ins. Co. v. Reboans, Inc.*, 900 F. Supp. 1246, 1250-51 (N.D. Cal. 1994) (reconsideration appropriate where intervening change in law) (citing *Sch. Dist. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

CONCLUSION

For these reasons the petition should be granted.

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Respectfully submitted,

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